

Rochester Tel Center
180 South Clinton Avenue
Rochester, New York 14646-0700

716-777-1028

Michael J. Shortley, III
Senior Corporate Attorney



RochesterTel

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BY OVERNIGHT MAIL

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

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RE: CC Docket No. 92-90 - The Telephone Consumer Protection
Act of 1991.

Dear Ms. Searcy:

Enclosed for filing please find an original plus nine (9) copies of the Comments of Rochester Telephone Corporation.

Please acknowledge receipt by affixing an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

cc: Downtown Copy Center

MJS:ub
(28042)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC MAIL SECTION

In the Matter of)
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The Telephone Consumer Protection)
Act of 1991)
)
)

CC Docket No. 92-90

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COMMENTS OF ROCHESTER
TELEPHONE CORPORATION

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MAY 26 1992

FCC MAIL BRANCH

JOSEPHINE S. TRUBEK
General Counsel

ROCHESTER TELEPHONE CORPORATION
180 South Clinton Avenue
Rochester, New York 14646
(716) 777-6713

Michael J. Shortley, III
of Counsel

May 22, 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
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CC Docket No. 92-90

COMMENTS OF ROCHESTER
TELEPHONE CORPORATION

Rochester Telephone Corporation ("Rochester"), on its behalf and that of its exchange carrier subsidiaries,^{1/} submits these comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding.^{2/} In the Notice,

^{1/} AuSable Valley Telephone Company, Inc., Breezewood Telephone Company, C, C & S Telco, Inc., Canton Telephone Company, Citizens Telephone Company, Inc., DePue Telephone Company, Enterprise Telephone Company, Fairmount Telephone Company, Inc., Highland Telephone Company, Inland Telephone Company, Lakeshore Telephone Company, Lakeside Telephone Company, Lakewood Telephone Company, Lamar County Telephone Company, Inc., Midland Telephone Company, Mid-South Telephone Company, Inc., Midway Telephone Company, Minot Telephone Company, Mondovi Telephone Company, Monroeville Telephone Company, Inc., Mt. Pulaski Telephone & Electric Company, Ontonagon County Telephone Company, Orion Telephone Exchange Association, Oswayo River Telephone Company, Prairie Telephone Company, S & A Telephone Company, Inc., The Schuyler Telephone Company, Seneca-Gorham Telephone Corporation, Southland Telephone Company, St. Croix Telephone Company, Sylvan Lake Telephone Company, Inc., The Thorntown Telephone Company, Inc., Urban Telephone Corporation, Viroqua Telephone Company, Vista Telephone Company of Iowa and Vista Telephone Company of Minnesota.

^{2/} The Telephone Consumer Protection Act of 1991, CC Dkt. 92-90, Notice of Proposed Rulemaking, FCC 92-176 (released April 17, 1992) ("Notice").

the Commission has proposed regulations that would implement the Telephone Consumer Protection Act of 1991 ("Act") by regulating the use of auto dialers and facsimile machines to transmit unsolicited commercial messages. The proposed regulations generally prohibit the use of auto dialers to engage in unsolicited commercial advertising. They do, however, create exceptions for uses that the Act did not clearly intend to prohibit.^{3/} The Commission has also proposed rules governing the technical standards to which auto dialers and facsimile machines must conform.^{4/}

In proposing these regulations, the Commission has properly balanced the privacy interests of telephone subscribers with the legitimate needs of telemarketing organizations. Consistent with the findings of Congress, the proposed regulations create a presumption that unsolicited commercial advertisements through the use of auto dialers and facsimile machines unreasonably intrude upon legitimate privacy expectations. On this basis, the Commission should adopt these regulations as proposed.

The Act also requires the Commission to initiate a rulemaking to consider the need for regulations to protect the legitimate privacy expectations of residential subscribers not

^{3/} Id., ¶¶ 9-17.

^{4/} Id., ¶¶ 20-21.

to receive unconsented commercial solicitations over the telephone, whether through live operators or auto dialers. Specifically, the Commission is considering several regulatory alternatives for implementing so-called "do not call" systems.^{5/} In undertaking this rulemaking, the Commission has requested comment on whether the use of live operators and the use of auto dialers raise different privacy concerns that warrant different regulatory treatment of these forms of solicitation.

In considering the proposed regulatory alternatives, the Commission should recognize that live solicitation is far less intrusive than the use of automated systems and fashion its approach accordingly. As is explained further below,^{6/} the Commission should create a presumption that live solicitations, during reasonable hours of the day, are consented to, while solicitations using auto dialers, in the absence of a preexisting business relationship, are not.

There are a number of indicia that live telephone solicitations involve, at best, minimal intrusions on subscribers' privacy interests. The acquisition of telephone service, especially with a listed telephone number, manifests an expectation that the telephone subscriber expects to receive

^{5/} Id., ¶¶ 26-33.

^{6/} See infra at 6-7.

telephone calls, even from telemarketing operations.^{7/} That expectation, however, is with the understanding that the recipient will be able to engage in a two-way communication. The two-way nature of a live solicitation distinguishes it from an automated one, rendering the former far less intrusive than the latter.

Moreover, as the Commission notes, more than \$435,000,000,000 in sales were generated in 1990 through the use of telemarketing operations.^{8/} In addition, of the complaints that the Commission received in 1991 regarding unsolicited telephone calls, only 10% resulted from live solicitations.^{9/} The Congressional history of the Act also reflects the perception that the use of auto dialers is far more intrusive than the use of live operators.^{10/}

Thus, the Commission should take into account these differing privacy expectations and, in so doing, fashion its regulations so that the costs of protecting whatever privacy expectations are at stake do not exceed the benefits thereof. Each of the methods of implementing "do not call" systems is bound to be fairly expensive and of dubious utility. Moreover,

^{7/} The Act implicitly recognizes this expectation by exempting from its coverage noncommercial solicitations and solicitations from tax exempt organizations. See 47 U.S.C. § 227(a)(3) (governing the use of auto dialers).

^{8/} Notice, ¶ 24.

^{9/} Id.

^{10/} Id.

each is unnecessary if the Commission distinguishes between live and automated solicitations and creates different presumptions for each. As the Commission recognizes, data base technologies would likely be expensive and the Act precludes the operators of such systems from recovering their costs from telephone subscribers.^{11/}

Network-based technologies, such as assigning NXX codes to telemarketers and special directory markings, are probably of limited utility. Moreover, they place the burden of enforcing the Act's requirements where it does not belong -- on exchange carriers.

Given the range of sizes and operations of telemarketing firms, a NXX-based solution is probably unworkable and unenforceable. Moreover, the supply of NXX codes is rapidly diminishing (at least until the introduction of interchangeable NPAs). Reliance upon directory markings is likely to be underinclusive. For example, the use of directory markings would not catch customers with unlisted or unpublished numbers whose telephone numbers have found their way onto telemarketing lists.

In addition, these two solutions place the burden of enforcement precisely where it does not belong. Exchange carriers have neither created, nor are they a part of, the problem that the Act is intended to address. Placing the

^{11/} Id., ¶ 29.

burden and costs of enforcement on exchange carriers would thus be both inappropriate and unfair.^{12/}

Rather than rely upon any of these approaches, the Commission should reasonably balance the privacy expectations of residential subscribers with the legitimate needs of telemarketing firms by creating two presumptions that recognize the differences between live and automated solicitations. Live solicitations, including "cold calls," would be deemed consented to if they occurred during reasonable hours, perhaps 9 a.m. to 9 p.m. If a customer wishes not to receive such calls, that customer could inform the organization of his or her desires.^{13/}

Automated solicitations would be treated differently. Such solicitations would be deemed unreasonable in the absence of a prior business relationship -- the purchase of goods or

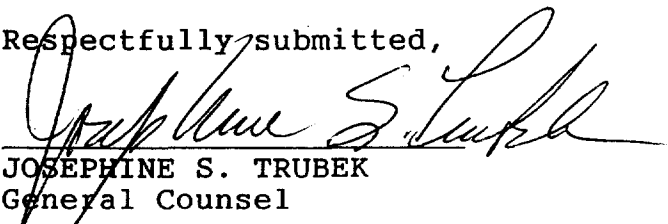
^{12/} If the Commission concludes that some means of implementing a "do not call" system is required, it should place the responsibility for implementing and enforcing that system on the telemarketing industry, perhaps through industry based or company specific "do not call" lists. See id., ¶ 32.

^{13/} This is a form of a company specific "do not call" list, in the sense that only subsequent, unwanted calls would be prohibited. Customers with unlisted or unpublished numbers would be treated in the same manner. The presumption would be that a telemarketing organization had obtained that customer's telephone number through legitimate means.

services by that subscriber from the business in question within the last twelve months.^{14/}

In this manner, the Commission may reasonably balance the privacy interests of residential subscribers against the legitimate needs of telemarketing firms so that the costs of such a program would not outweigh the benefits to be obtained thereby.

Respectfully submitted,



JOSEPHINE S. TRUBEK
General Counsel

ROCHESTER TELEPHONE CORPORATION
180 South Clinton Avenue
Rochester, New York 14646
(716) 777-6713

Michael J. Shortley, III
of Counsel

May 22, 1992

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^{14/} Some time limitation is necessary to insure that any business relationship has not become so stale that it would make no sense to conclude that the customer and the firm continue to have such a relationship.